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No. 91-809

In The

Supreme Court of the United States

October Term, 1991

JACK GRIFFIN,

Petitioner,

v.

FIRST GIBRALTAR BANK, FSB,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

First Gibraltar Bank, FSB ("First Gibraltar"),[1] respectfully requests that this Court deny the petition for writ of certiorari of petitioner, Jack Griffin ("Griffin").

STATEMENT OF THE CASE

On or about July 11, 1985, First Texas Savings Association ("First Texas") made a loan to The Village at Spring Park Joint Venture (the "Joint Venture") evidenced

[1] First Gibraltar's parent company is First Gibraltar Holdings, Inc. There are no nonwholly owned subsidiaries.

by a promissory note in the face amount of $5,690,000.00 (the "Note"). (R. 248). The Note was secured by a Deed of Trust and Security Agreement covering certain real property in Dallas County, Texas. (R. 248). Concurrently with execution of the Note, Appellant Jack Griffin ("Griffin") and Worth Williams ("Williams") executed and delivered a Guaranty in favor of First Texas, by which they unconditionally guaranteed the prompt payment of the Note in an amount limited as set forth in the Guaranty. (R. 248). Although Griffin alleges in his Complaint the existence of agreements by First Texas to provide further financing for construction on the property and First Gibraltar did not contest the existence of such agreements for purposes of its summary judgment motion, it is clear that such agreements, if any, were not in writing.

On or about July 25, 1986, the Joint Venture executed a Loan Renewal and Extension Agreement extending the term of the Note, and Williams and Griffin executed a Guarantor Ratification, ratifying and confirming the Guaranty they had executed in July 1985. (R. 249).

On March 17, 1987, after default on the note and commencement of voluntary bankruptcy proceedings, First Texas filed suit in the 116th District Court of Dallas County, Texas, against Williams and Griffin on their Guaranty. The bankruptcy court subsequently modified the automatic stay to permit foreclosure, and on May 5, 1987, the property was sold at a Substitute Trustee's Sale for $3,888,500.00.[2] After allowing all credits and offsets, a

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[2] Although Griffin also alleged in his Complaint that First Texas agreed to bid in the property at a specified price at the

(Continued on following page)

deficiency of $2,178,082.82 remained due and owing on the Note following foreclosure. (R. 250). First Texas continued to pursue its state court action against Williams[3] and Griffin on the Guaranty.

On December 27, 1988, the Federal Home Loan Bank Board ("FHLBB") appointed the Federal Savings and Loan Insurance Corporation ("FSLIC") to serve as receiver for First Texas. (R. 247). On January 26, 1989, the FSLIC removed the First Texas proceeding to district court. Pursuant to a December 27, 1988, Acquisition Agreement, certain assets of First Texas were transferred by FSLIC, as receiver for First Texas, to First Texas Bank, FSB, a newly chartered institution. (R. 247). First Texas Bank, FSB changed its name to First Gibraltar Bank, FSB on January 20, 1989. (R. 247).

Among the assets transferred to First Gibraltar on December 27, 1988, were the Note and the Guaranty, and First Gibraltar has remained the owner of the Note and the Guaranty since acquiring it from the FSLIC. (R. 247).

On or about May 23, 1989, First Gibraltar filed a Plea in Intervention in the district court which was granted on July 3, 1989.

(Continued from previous page)

foreclosure sale and First Gibraltar did not contest the existence of such agreement for purposes of its summary judgment motion, it is clear that such agreement, if any, was not in writing.

[3] Williams also subsequently filed voluntary bankruptcy and was dismissed as a party in this action.

On August 30, 1989, Griffin filed a motion to remand this action to the state court for lack of subject matter jurisdiction. On September 6, 1989, First Gibraltar filed its motion for summary judgment on its claim to collect on Griffin's Guaranty and on Griffin's affirmative defenses and counterclaims. On November 21, 1989, the district court granted Griffin's motion to dismiss his counterclaims against the Federal Deposit Insurance Corporation ("FDIC"), which had succeeded FSLIC as receiver for First Texas. On January 17, 1990, the district court issued its memorandum opinion and order denying Griffin's motion to remand and granting First Gibraltar's motion for summary judgment. Final summary judgment was entered on February 7, 1990, awarding First Gibraltar $1,442,500.00, together with prejudgment interest of $684,673.76 and attorneys' fees of $9,900. (R. 1050-51). On July 15, 1991, the Fifth Circuit affirmed the district court judgment, and Griffin filed his petition for writ of certiorari on or about November 19, 1991.

REASONS FOR DENYING THE PETITION

Contrary to Griffin's argument, this case does not present issues of exceptional importance; it is, therefore, not worthy of review by this Court. This case is no different from the hundreds of claims and defenses filed every day by borrowers and guarantors of failed institutions to avoid repaying loan funds which were admittedly received and used to their own benefit. In his quest for a writ of certiorari, Griffin has not suggested that there is a split in the applicable decisions of the courts of appeals. Indeed, in good faith he could not make such a

suggestion, since the courts of appeals have uniformly applied the *D'Oench Duhme* doctrine to deny precisely the claims and defenses which he asserts here. Furthermore, Griffin's primary arguments on jurisdiction and choice of law have already been decided against him by long-standing decisions of this Court.[4]

I. THIS CASE WAS PROPERLY REMOVED TO FEDERAL DISTRICT COURT.

Griffin attacks the trial court's exercise of jurisdiction on two grounds: (1) the case does not arise under federal law because the proviso of former 12 U.S.C. § 1730(k)(1) applies, and (2) the court of appeals incorrectly applied 12 U.S.C. § 1819 retroactively to cure any defect in the original removal of the case.[5]

With regard first to § 1819, First Gibraltar has been unable to find a circuit court which has declined to apply

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[4] Griffin also raises miscellaneous constitutional challenges to the application of *D'Oench Duhme* to his claims and defenses. However, he never raised these issues in the trial court. *See* Memorandum Opinion and order entered Jan. 7, 1990 (Pet. App. C at 27a-32a). Griffin gives no valid argument why this Court should find the application of *D'Oench Duhme* unconstitutional, and his case presents no circumstances which have not already been encountered by the federal courts in 50 years of interpreting *D'Oench Duhme*.

[5] Section 407 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 ("FIRREA") repealed 12 U.S.C. § 1730(k)(1), and Section 209 of FIRREA amended 12 U.S.C. § 1819, which is now the relevant jurisdictional provision. *Triland Holdings & Co. v. Sunbelt Serv. Corp.*, 884 F.2d 205, 207 (5th Cir. 1989).

the provision retroactively. *See, e.g., Kirkbride v. Continental Casualty Co.*, 933 F.2d 729, 731-32 (9th Cir. 1991); *FDIC v. 232, Inc.*, 920 F.2d 815, 818-19 (11th Cir. 1991); *FDIC v. Kasal*, 913 F.2d 487, 493 (8th Cir. 1990), *cert. denied*, U.S., 111 S. Ct. 1072 (1991); *Demars v. First Serv. Bank for Sav.*, 907 F.2d 1237, 1238-40 (1st Cir. 1990); *Triland Holdings & Co. v. Sunbelt Serv. Corp.*, 884 F.2d 205, 207 (5th Cir. 1989). As can be seen from these cases, application of § 1819 to this case is consistent with the controlling standards set by this Court for determining whether a new statute should be retroactively applied in cases where, as here, standards of conduct have not been altered by the statute. *See Bradley v. School Bd. of Richmond*, 416 U.S. 696, 716, 94 S. Ct. 2006, 2019 (1974) (courts are to apply law in effect at time of decision unless doing so would result in manifest injustice). However, this Court does not even need to reach this question to deny Griffin's petition, because the district court had jurisdiction under § 1730(k)(1).

With regard to § 1730(k)(1), it is important to note that, while he complains loudly that the court below incorrectly held that the proviso does not apply in this instance, Griffin never explains how this case fits within both the requirements of the proviso to deny federal jurisdiction. He faults the court of appeals' holding that First Gibraltar, as a newly chartered federal institution, is a non-proviso party, but he ignores the emphasis which the court below places on the conjunction "and" in listing the elements of the proviso. *See* Pet. App. A at 5a. Thus, for the proviso to apply, a case must concern only proviso parties *and* only questions of state law can be involved. His sole argument for the application of state law (which appears in another section of the petition at page 22)

depends on a tortured reading of this Court's opinion in *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 109 S. Ct. 1361 (1989),[6] a reading which is in direct conflict with controlling decisions of this Court predating even *D'Oench Duhme*.

As early as 1940, this Court recognized that "[t]he National Bank Act (12 U.S.C.A. § 21 et seq.) constitutes 'by itself a complete system for the establishment and government of national banks.' " *Deitrick v. Greaney*, 309 U.S. 190, 194, 60 S. Ct. 480, 482 (1940) (citations omitted). The Court concluded:

> A point much discussed in brief and argument, upon the assumption that local law will guide our decision is whether, by Massachusetts law respondent is precluded from setting up the illegality of the transaction as a defense to his note. But it is the federal statute which condemns as unlawful respondent's acts. The extent and nature of the legal consequences of this condemnation though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted. We have recently held that the judicial determination of the legal consequences which flow from acts condemned as unlawful by the National Bank Act involves decision of a federal, not a state question.

309 U.S. at 200-01, 60 S. Ct. at 485 (citations omitted).

Two years later, in the leading case of *D'Oench Duhme & Co. v. FDIC*, 315 U.S. 447, 62 S. Ct. 676 (1942), this Court reaffirmed that federal law applied:

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[6] *See* Pet. App. A at 6a n.2 for the discussion by the court of appeals on the actual holdings in *Coit*.

> The jurisdiction of the District Court in this case, however, is not based on diversity of citizenship. Respondent, a federal corporation, brings this suit under an Act of Congress authorizing it to sue or be sued "in any court of law or equity, State or Federal."[2] Whether the rule of the Klaxon case applies where federal jurisdiction is not based on diversity of citizenship, we need not decide. For we are of the view that the liability of petitioner on the note involves decision of a federal not a state question under the rule of Deitrick v. Greaney, 309 U.S. 190, 60 S. Ct. 480, 84 L. Ed. 694.

315 U.S. at 455-56, 62 S. Ct. at 679 (citations omitted; footnote in original).

The footnote which appears in the middle of the quotation from *D'Oench Duhme*, above, is particularly relevant to this case. Footnote 2 quotes the remaining portion of the Federal Reserve Act as it existed in 1942. That language from the old statute is almost identical to § 1730(k)(1), first, in providing that suits to which the corporation is a party "shall be deemed to arise under the laws of the United States" and, second, in including a proviso that suits which involve "only the rights or obligations of depositors, creditors, stockholders and such State bank *under State law* shall not be deemed to arise under the laws of the United States." 315 U.S. at 455, 62 S. Ct. at 678 n.2 (emphasis added). Furthermore, like First Texas in this case, the bank involved in *D'Oench Duhme* was a state-chartered institution. *See* 315 U.S. at 460, 62 S. Ct. at 680. Thus, Griffin's assertions in this case do not differ significantly from those which the petitioner in *D'Oench Duhme* argued to this Court 50 years ago. The

Court plainly held then that federal law applied, and Griffin has presented this Court with no viable argument that state law should apply in his particular case. *See also Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S. Ct. 2510, 2514-15 (1988) (citing *D'Oench Duhme* for proposition that some areas which involve "uniquely federal interests" are "so committed by the Constitution and laws of the United States to federal control that state law is preempted and replaced, where necessary, by federal law of a content prescribed (absent *explicit* statutory directive) by the courts – so-called 'federal common law.' ").

Since federal, not state, law applies in this case, Griffin cannot meet the requirement of the proviso that the case must involve *only* state law. Griffin cannot successfully invoke the proviso to defeat removal jurisdiction under § 1730(k)(1) regardless of whether the court of appeals completely expressed its rationale for declining to apply the proviso. There is thus no occasion for certiorari review here.

II. SECTION 1823(e) HAS NOT PREEMPTED *D'OENCH DUHME*.

For 50 years, the *D'Oench Duhme* doctrine has been applied and expanded to effect the federal policy "to protect [the FDIC] and the public funds which it administers against misrepresentations as to the . . . . assets in the portfolios of the banks which [it] insures or to which it makes loans." *D'Oench Duhme*, 315 U.S. at 457, 62 S. Ct. at 679. Griffin seeks to undermine this federal policy and destroy the well-established principles articulated in *D'Oench Duhme* and its progeny by urging this Court to

consider whether 12 U.S.C. § 1823(e) preempts that precedent – something that Congress itself has not seen fit to do in its many revisions to the banking laws since 1942. Griffin cites no cases in support of his argument for statutory preemption of common law which suggest in any way that *D'Oench Duhme* has lost its viability since the passage of § 1823(e). Furthermore, his argument that the Fifth Circuit "recognized that the enactment of § 1823(e) was a codification of the *D'Oench* estoppel" is based on a failure to read all the words which the court below used. The court of appeals stated that the "*D'Oench Duhme* requirement is now embodied *in part* in federal statute." Pet. App. A at 11a (emphasis added). The application of *D'Oench Duhme* is nothing more than the natural development of federal common law in this area of "uniquely federal interest" – a development which this Court has expressly recognized as appropriate. *See Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S. Ct. 2510, 2514 (1988). If Congress wished to overturn or limit any of the decisions which interpret the principles of *D'Oench Duhme*, it certainly knows how to do so. Since Griffin makes no claim that the lower courts are not uniformly and consistently applying *D'Oench Duhme*, there is no reason for this Court to review this issue.

CONCLUSION

Griffin's petition raises no issue worthy of review. Therefore, First Gibraltar requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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